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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1086

KENNETH W. DAY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a suit brought to set aside an order of the Interstate Commerce Commission. The Commission's order approved the merger of the Pacific Electric Railway Company and the Southern Pacific Company and provided for cer-

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tain conditions protecting employees affected by the merger. Appellants are ten Pacific Electric employees and an association of executives of major railroad unions.

By an application filed February 28, 1964, and supplemented on June 4, 1964, Southern Pacific and Pacific Electric requested authority under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), to merge Pacific Electric's properties and franchises into Southern Pacific for purposes of ownership, management, and operation (J.S. 12a). Pacific Electric, which has been wholly owned by Southern Pacific since 1911, has served principally as a feeder line to Southern Pacific (J.S. 14a). The purpose of the merger was to simplify Southern Pacific's corporate structure and to permit continued close cooperation between the carriers for relief of traffic congestion at Southern Pacific's Taylor Yard in Los Angeles.[1] On

[1] Prior to 1953, Southern Pacific traffic passing through or destined for Los Angeles was processed at the Taylor Yard. In order to relieve traffic congestion that had resulted in delays in service, Southern Pacific in 1953 and 1954 began moving this traffic via Pacific Electric (J.S. 18a–19a). In 1961, certain labor unions affiliated with the appellant union filed a complaint with the Commission charging that the carriers were separate companies operating in violation of the pooling and division of traffic provisions of the Interstate Commerce Act, 49 U.S.C. 5(1). Public hearings were held. The hearing examiner found that Pacific Electric and Southern Pacific were separate corporate entities and that existing arrangements for alleviation of traffic congestion at the Taylor Yard violated the pooling provisions of the Act. The Commission's order of September 23, 1964, approving the merger noted that since the complaint proceeding was based on the relationship between the carriers as separate entities, the approved merger would elimi-

September 23, 1964, the Commission approved the merger (J.S. 10a–25a).

By letter to the Commission of March 4, 1964, the Railway Labor Executives' Association (RLEA) protested the approval of the proposed merger and requested notice of any hearings "which may subsequently be arranged." It stated that, if approved, the merger "may well have an adverse effect on the employees of the [carriers] as well as employees of other railroad carriers affected." (RLEA App. 1.[2]) The Commission answered the letter, noting that no other protests had been filed and inquiring of RLEA whether certain conditions for the protection of affected employees would be satisfactory in the event no public hearing was held (RLEA App. 2).

On April 7, 1964, RLEA responded to the Commission's answer and "respectfully [urged] that the Interstate Commerce Commission schedule [a] hearing to receive evidence supporting our position in this matter" (RLEA App. 3). On April 13, 1964, RLEA again wrote to the Commission, stating that it considered a hearing imperative to determine whether the merger would be in the public interest, and arguing that, since both carriers were financially

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nate the factual foundation for the complaint and render the complaint proceeding moot, thereby permitting the cooperative arrangements regarding the Taylor Yard to continue in effect (J.S. 22a–23a).

[2] The record of proceedings before the Commission was not filed in the district court by appellants. Instead, they attached certain material as an appendix to their brief below, which we cite herein as "RLEA App."

strong, approval of the merger would not be in the public interest unless some public need was shown, or a demonstration made that no harm would result to the employees (RLEA App. 4). The Commission replied that the request would be considered (RLEA App. 5).

In the order approving the merger, the Commission addressed itself to the contentions of RLEA and ruled that a hearing would not be necessary in the public interest (J.S. 14a). The Commission imposed broad conditions for the protection of employees (J.S. 14a–15a), including protection against loss of wages, moving expenses, loss of fringe benefits, and loss on sale of homes. Subsequently, the Commission entertained a petition for reconsideration filed by RLEA, despite the fact that RLEA had not formally intervened, as required by the Commission's rules of practice. The Commission denied the petition, but its order of denial specifically incorporated Sections 4, 5, and 9 of the Washington Job Protection Agreement (an industry-wide collective bargaining agreement containing provisions protecting employees affected by mergers) in the conditions previously imposed (J.S. 28a).

On appeal by the employees and the RLEA to the three-judge district court, the Commission's order approving the merger was affirmed. The court held in a *per curiam* opinion that the protective provisions were more than adequate and that no basis for a hearing had been shown (J.S. 1a–9a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The sole

issue is whether the Interstate Commerce Commission properly determined that a public hearing on the merger of the Southern Pacific Co. with its wholly owned subsidiary, the Pacific Electric Railway Co., was unnecessary, when no public protest against the merger had been filed except by the employees involved and they had not specified any factual issues requiring a hearing. The Commission's order permitting the merger provides for the employees fair and equitable protective conditions which appellants do not question. In the circumstances, the district court's affirmance of the Commission's order was clearly correct.

Under the provisions of the Interstate Commerce Act dealing with railroad mergers, a full public hearing need not be held if "the Commission determines that a public hearing is not necessary in the public interest." Section 5(2)(b), 49 U.S.C. 5(2)(b).[3] Whether or not a hearing is held, the Commission must give weight, among other considerations, to "the interest of the carrier employees affected." Section 5(2)(c), 49 U.S.C. 5(2)(c). To this end, as a condition of its approval of a merger, the Commission must "require a fair and equitable arrangement" to protect the employees, including a condition that for four years after the effective date of the order they will not be in a worse position with respect to their employment than prior thereto. Section 5(2)(f), 49 U.S.C. 5(2)(f).

The Commission did not abuse its discretion in determining under Section 5(2)(b) that the public in-

[3] In changing the prior law, which required a hearing in all merger cases, Congress determined that not all such cases have such importance as to necessitate a public hearing (H. Rep. No. 971, 81st Cong., 1st Sess., p. 3, attached as App. 6 to the Brief of Southern Pacific Company below).

terest did not require a hearing in this case. When appellants indicated that they wanted a hearing, they were given ample opportunity to direct the Commission's attention to any facts and issues which they felt should be explored in a hearing. They presented no particulars, however, either on the merits of the merger or with respect to the Commission's obligation to "give weight" to the employees' interest, which demonstrated that a hearing was necessary.

Nevertheless, the Commission did carefully consider appellants' requests and adopted elaborate conditions (not challenged as inadequate or unlawful) for the protection of the employees. Appellants thus received the essentials of a fair hearing (albeit not an oral one) and their interests were fully protected. Due process requires no more. *Yakus* v. *United States,* 321 U.S. 414, 436; *Riss & Co.* v. *United States,* 117 F. Supp. 296, 304 (W.D. Mo.), affirmed, 346 U.S. 890; cf. *United States* v. *Storer Broadcasting Company,* 351 U.S. 192, 205. Nor have appellants any absolute statutory right to a hearing as labor representatives under Section 17(11) of the Act, which provides in general terms that employees' representatives "may intervene and be heard in any proceeding arising under the Act." They were heard, albeit not in a public hearing. There is no indication that Section 17(11) was intended to override the express language of Section 5(2)(b) which authorizes the Commission to dispense with unnecessary public hearings.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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APRIL 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966